

***DISTRICT OF MAINE***

*Defendant*

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***Docket No. 99-118-P-H***

Plaintiff Janny Kerkhof and defendant MCI WorldCom, Inc. (“WorldCom”) cross-move for summary judgment in the instant action alleging violations of Kerkhof’s employment-benefit rights. Defendant’s Motion for Summary Judgment or Partial Summary Judgment, etc. (“Defendant’s Motion”) (Docket No. 28); Plaintiff’s Motion for Summary Judgment, etc. (“Plaintiff’s Motion”) (Docket No. 33). Kerkhof clarifies that she no longer presses Counts II, VI-IX and XI-XIII of her amended complaint, *see* Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment (“Plaintiff’s Opposition”) (Docket No. 37) at 1 n.1; Amended Complaint and Demand for Jury Trial (“Complaint”) (Docket No. 5); hence, I confine my discussion to the remaining counts, I, III-V and X. For the reasons that follow, I recommend the partial grant and partial denial of both motions.<sup>1</sup>

<sup>1</sup> Kerkhof also moves, in connection with the cross-motions for summary judgment, to strike an affidavit of Dennis Sickel. Plaintiff's Motion To Strike Second Affidavit of Dennis Sickel (Docket No. 48). Inasmuch as I find the contents of the Sickel affidavit immaterial the motion is denied as moot, without prejudice to its consideration should the court decline to adopt this recommended decision.

## **I. Summary Judgment Standards**

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). In cases such as this, involving cross-motions for summary judgment, the court must draw all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there are any genuine issues of material fact, both motions must be denied as to the affected issue or issues of law; if not, one party is entitled to judgment as a matter of law. 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2720, at 336-37 (1998).

## II. Factual Context

The bulk of the facts pertinent to this decision are undisputed for purposes of summary judgment. Kerkhof began working for MFS International, Inc. (“MFS”) as a program coordinator in its Vienna, Virginia office in May 1995. Defendant’s Statement of Material Undisputed Facts (“Defendant’s SMF”) (Docket No. 27) ¶ 1; Plaintiff’s Opposing Statement of Material Facts (“Plaintiff’s Opposing SMF”) (Docket No. 38) ¶ 1. On September 29, 1995 Kerkhof entered into a stock option agreement (“SOA”) with her employer, then MFS Communications Company, pursuant to the MFS Communications Company, Inc. 1993 Stock Plan (the “1993 Stock Plan”). Defendant’s SMF ¶ 34; Plaintiff’s Opposing SMF ¶ 34. The SOA, which granted Kerkhof an option to purchase 300 shares of common stock at a purchase price of \$43.75 per share, provided in relevant part:

3. Exercisability.

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3.2 Options shall vest as follows: 20% of the total number of Options granted hereunder will vest on September 29, 1996 and over the subsequent four years, Options will vest quarterly at 5% of the total Options granted hereunder on each December 31, March 31, June 30 and September 29 with the last Option vesting date being September 29, 2000.

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3.4 In the event of a Change of Control (as hereinafter defined) and the Employee’s subsequent Involuntary Termination (as hereinafter defined) within two years thereafter, the full number of the Option Shares shall immediately vest.

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9. Definitions.

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(b) Involuntary Termination. Involuntary Termination shall mean either:

- (i) the actual involuntary termination without cause of the Employee's employment with the Company or one of its subsidiaries after a Change of Control, or
- (ii) the constructive involuntary termination of the Employee's employment with the Company or one of its subsidiaries after a Change of Control.

The term "constructive involuntary termination" shall include (x) a material reduction in the Employee's compensation (including applicable fringe benefits), (y) the demotion or diminution in the Employee's position, authority, duties or responsibilities without cause or (z) the relocation of the Employee's principal place of employment, without consent.

SOA, attached as Exh. 2 to Plaintiff's Statement of Material Facts ("Plaintiff's SMF") (Docket No. 34), ¶¶ 1-2, 3.2, 3.4, 9(b). In a series of "Q&As" from MFS management to participants, MFS stated that a participant claiming constructive termination must "actually terminate [his/her] employment on account of those company actions [pay reduction; position reduction; relocation]." Defendant's SMF ¶ 47; Plaintiff's Opposing SMF ¶ 47.

Kerkhof also became a participant in the 1995 Shareworks Grant Plan (the "Shareworks Plan"), which provided a grant of stock valued at up to five percent of her current salary into a 401(a) tax-deferred plan. Defendant's SMF ¶ 36; Plaintiff's Opposing SMF ¶ 36. The Shareworks Plan provided in relevant part:

**ARTICLE I.  
DEFINITIONS AND CONSTRUCTION**

1.1     DEFINITIONS

The following words and phrases shall have the meanings set forth below, unless the context clearly indicates otherwise:

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(l)       “Employee” means any person who is employed by the Company or a Participating Employer . . .

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(aa)      “Participant” means any Employee who becomes a participant in the Plan as provided in Section 3.1, and has not for any reason become ineligible to participate further in the Plan.

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(dd)      “Plan Year” means . . . beginning on January 1, 1997 and thereafter, the twelve (12) month period commencing each January 1st [sic] of each year and ending the following December 31st.

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(jj)      “Terminated Participant” means a person who has been a Participant, but whose employment has been terminated other than by death, Total and Permanent Disability or retirement.

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**ARTICLE II.  
ADMINISTRATION**

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2.4     POWERS AND DUTIES OF THE ADMINISTRATOR

. . . The Administrator . . . shall have the power and discretion to construe the terms of the Plan and to determine all questions arising in connection with the administration, interpretation, and application of the Plan. Any such determination by the Administrator shall be conclusive

and binding upon all persons. . . . [A]ny procedure, discretionary act, interpretation or construction . . . shall be consistent with the intent that the Plan shall continue to be deemed a qualified plan under the terms of Section 401(a) of the Code, and shall comply with the terms of the Act and all regulations issued pursuant thereto.

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#### **ARTICLE IV. CONTRIBUTION AND ALLOCATION**

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##### **4.4 FORFEITURES**

If a Participant terminates his employment before his Account is vested, the Participant's Account shall be forfeited as of the last day of the Plan Year during which his termination of employment occurred, and shall be used to reduce any Employer contributions made pursuant to Section 4.1. If such a Participant again becomes a Participant in the Plan before he incurs five (5) consecutive Breaks in Service, the Employer shall make an additional contribution to the Plan on his behalf . . . .

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#### **ARTICLE VI. VESTING**

##### **6.1 VESTING**

A Participant shall be 100% Vested in the number of Shares of Stock credited to such person's Account:

- (i) after three (3) Years of Service . . . ;

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#### **ARTICLE VII. DETERMINATION AND DISTRIBUTION OF BENEFITS**

##### **7.1 DISTRIBUTIONS UPON TERMINATION OF EMPLOYMENT OR DISABILITY**

(a) If, upon a Participant's Termination of Employment, such person is Vested in his Account under the Plan, the Trustee shall distribute the value of such Participant's Account in accordance with the provisions

of this Section 7.1. If, upon a Participant's Termination of Employment, such person is not Vested in his Account under the Plan, he shall not be entitled to receive any distribution from his Account under the Plan, and the value of such Account shall be forfeited in accordance with the provisions of Section 4.4.

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## **ARTICLE VIII. AMENDMENT, TERMINATION AND MERGERS**

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### **8.2. TERMINATION**

(a) The Company shall have the right at any time to terminate the Plan by delivering to the Trustee and Administrator written notice of such termination. Upon any full or partial termination, all amounts credited to the affected Participants' Accounts shall become 100% Vested and shall not thereafter be subject to forfeiture . . . .

Shareworks Plan, attached as Exh. 3 to Plaintiff's SMF, at 1, 3-4, 6-7, 10, 16-17, 21, 23-24, 31-32.

The summary plan description ("SPD") for the Shareworks Plan provides, "If you are 0% vested in your Plan account when you terminate employment . . . you will forfeit your entire account at that time." Defendant's SMF ¶ 41; Plaintiff's Opposing SMF ¶ 41.

Effective December 31, 1996 a subsidiary of MFS merged with WorldCom, Inc., a global communications company that was much larger than MFS. Defendant's SMF ¶ 10; Plaintiff's Opposing SMF ¶ 10. This constituted a "Change of Control" as defined in the SOA. Plaintiff's SMF ¶ 15; Defendant's Response to Plaintiff's Statement of Material Facts ("Defendant's Opposing SMF") (Docket No. 36) ¶ 15.

Following the merger, Kerkhof's stock options under the SOA were converted into options on 1,260 shares of WorldCom stock at an exercise price of \$10.417 per share, subject to the vesting requirements specified in the SOA. Plaintiff's SMF ¶ 25;

Defendant's Opposing SMF ¶ 25. Her MFS stock in the Shareworks Plan also was converted to WorldCom stock. Plaintiff's SMF ¶ 31; Defendant's Opposing SMF ¶ 31.

By letter dated June 3, 1997 Kerkhof resigned from her position with WorldCom effective June 6, 1997.<sup>2</sup> Plaintiff's SMF ¶ 27; Defendant's Opposing SMF ¶ 27. In that letter, Kerkhof requested "consideration of a leaving package under constructive dismissal," citing an alleged "diminution of my previous responsibilities." Defendant's SMF ¶ 30; Plaintiff's Opposing SMF ¶ 30. On or about July 15, 1997 WorldCom communicated to Kerkhof the denial of her request. Plaintiff's SMF ¶ 40; Defendant's Opposing SMF ¶ 40. By letter dated August 7, 1997 Kerkhof sought a reconsideration. Defendant's Opposing SMF ¶ 40; Plaintiff's Reply Statement of Material Facts ("Plaintiff's Reply SMF") (Docket No. 41) ¶ 40. The claim was reinvestigated and again denied. *Id.*

Kerkhof maintained an account balance in the Shareworks Plan of 268.230 shares of WorldCom stock as of June 30, 1997.<sup>3</sup> Plaintiff's SMF ¶ 34; Defendant's Opposing SMF ¶ 34. To date, WorldCom has refused to allow Kerkhof access to her account balance of 268.2304 shares of WorldCom stock, claiming that her rights to that balance have not vested. Plaintiff's SMF ¶ 45; Defendant's Opposing SMF ¶ 45.

On or about August 19, 1997, pursuant to the 1993 Stock Plan, Kerkhof exercised options on 378 shares of WorldCom stock, leaving a balance of 882 options. Plaintiff's

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<sup>2</sup>Kerkhof received positive performance evaluations during her employment with WorldCom and was eligible for rehire. Plaintiff's SMF ¶ 28; Defendant's Opposing SMF ¶ 28.

<sup>3</sup>WorldCom asserts that this was so only because the trustee of the plan, Merrill Lynch, had not yet been notified that Kerkhof had quit and forfeited the shares in her account. Defendant's Opposing SMF ¶ 34.

SMF ¶ 35; Defendant's Opposing SMF ¶ 35. WorldCom denied her requests that she be allowed to exercise the remaining 882 options. *Id.*

While employed by MFS Kerkhof reported to Kishan Vij, who by late 1996 reported to Director of International Implementation Services John Williams. Defendant's SMF ¶ 3; Plaintiff's Opposing SMF ¶ 3. On April 3, 1997 Williams held a meeting in his office with the people who reported to him to inform them of various changes in reporting relationships that would be implemented as a result of the assimilation of the MFS work force into WorldCom. Defendant's SMF ¶ 11; Plaintiff's Opposing SMF ¶ 11. During that meeting Kerkhof learned that she would be reporting to Judy Cody, a Rockville, Maryland-based manager for international facilities. *Id.* Williams did not have any knowledge of, nor did he provide any information with regard to, possible changes in titles or job duties, but he told those assembled that their new directors would be getting in touch with them to discuss the specifics of their assignments. *Id.*

Kerkhof never actually began performing the job she was assigned under Cody. Defendant's SMF ¶ 14; Plaintiff's Opposing SMF ¶ 14. From April 3, 1997 until she resigned on June 6, 1997 she continued to perform her regular duties. *Id.* However, she resigned only after her efforts to find an equivalent position with MFS failed. Plaintiff's Opposing SMF ¶ 14; Consolidated Statements of the Parties Relating to Material, Undisputed Facts, etc. ("Defendant's Reply SMF") (Docket No. 44) ¶ 14.<sup>4</sup> At the time of her departure, Kerkhof claimed to have only a "vague" understanding of what her job

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<sup>4</sup>Kerkhof states that she "remained" only after efforts to find an equivalent job failed. *See* Plaintiff's Opposing SMF ¶ 14. This is evidently a typographical error. *See* Deposition of Janny Kerkhof, filed with Defendant's Motion, at 7.

duties would have been under Cody. Defendant's SMF ¶ 15; Plaintiff's Opposing SMF ¶ 15. She referred to her job in the WorldCom International Facilities Group as a "proposed reassignment." *Id.* At the point of her resignation, a job description had not yet been crafted and no extended discussions had taken place regarding her new duties. *Id.* On the other hand, Kerkhof knew Cody prior to being informed of her assignment to work under her and knew the tasks that Cody's group performed. Plaintiff's Opposing SMF ¶ 15; Defendant's Reply SMF ¶ 15. When Kerkhof was given an orientation of the Rockville, Maryland office where Cody's group was stationed, she was shown among other things how to file, staple and organize certain papers and files. *Id.* Although she had requested but not yet received a written job description at the time of her resignation, she did not need one to know what she would be doing in her new assignment after she was told what it would be and shown certain tasks by Cody. *Id.*

The parties dispute whether Kerkhof's assignment to Cody's group constituted a demotion or diminution in her job duties or responsibilities. Defendant's SMF ¶¶ 22-23; Plaintiff's Opposing SMF ¶¶ 22-23; *compare, e.g.,* Deposition of Judy Cody, filed with Defendant's Motion, at 26-27 (disagreeing that job change "represented a significant diminution of her previous responsibilities") *with id.* at 62 (agreeing that certain of plaintiff's responsibilities would have been eliminated and that "when something is eliminated, it is also being diminished in some fashion").

Prior to the merger, Kerkhof had been eligible for a bonus of up to twenty percent of her base salary as part of her compensation package (the "MFS Bonus Plan"). Plaintiff's SMF ¶ 17; Defendant's Opposing SMF ¶ 17. Her base salary was \$55,000 in 1995, \$56,282.72 in 1996 and \$60,045.15 in 1997. Plaintiff's SMF ¶ 18; Defendant's

Opposing SMF ¶ 18. Pursuant to the MFS Bonus Plan, Kerkhof had earned bonuses of fifteen percent of her base salary in 1995 and approximately eleven percent in 1996. Plaintiff's SMF ¶ 19; Defendant's Opposing SMF ¶ 19. Her gross pay for 1996, excluding any stock or stock options, exceeded \$70,000. Plaintiff's SMF ¶ 20; Defendant's Opposing SMF ¶ 20.

Following the merger, WorldCom eliminated the MFS Bonus Plan and replaced it with eligibility for an annual holiday bonus of \$400. Plaintiff's SMF ¶ 22; Defendant's Opposing SMF ¶ 22. The Shareworks Plan was terminated effective June 30, 1997. Defendant's SMF ¶ 40; Plaintiff's Opposing SMF ¶ 40. On or about April 28, 1997 WorldCom also announced termination of the 1993 Stock Plan. Plaintiff's SMF ¶ 26; Defendant's Opposing SMF ¶ 26. However, in May 1997 Kerkhof was made aware that if she stayed, she would have been eligible for options on 1,200 shares of WorldCom stock issued in summer 1997 (the "Special Stock Grant"). Defendant's SMF ¶ 67; Plaintiff's Opposing SMF ¶ 67. WorldCom timed the announcement of the elimination of the MFS Bonus Plan to coincide with the announcement of the introduction of the Special Stock Grant so that employees would understand that the elimination of the bonus plan would be more than offset by the additional stock options. *Id.*

Had Kerkhof continued her employment with WorldCom, two-thirds of the 1,200 Special Stock Grant options, or 800, would have vested by November 1999. Defendant's SMF ¶ 68; Plaintiff's Opposing SMF ¶ 68. Their market price as of that time would have been approximately \$70,000 (market price of \$85 less strike price of \$26).<sup>5</sup> *Id.* After the merger Kerkhof received a merit increase in annual salary of approximately \$3,800 and

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<sup>5</sup>Cody and her entire group were terminated on or about March 30, 1999. Plaintiff's Opposing SMF ¶ 68; Defendant's Reply SMF ¶ 68.

became eligible for a match in her 401(k) plan that initially was three percent and would have increased to five percent as of November 1999. Defendant's SMF ¶ 69; Plaintiff's Opposing SMF ¶ 69; Defendant's Reply SMF ¶ 69.

There were no written guidelines concerning the interpretation and application of the "material reduction in compensation" provisions of the 1993 Plan and the Shareworks Plan. Plaintiff's SMF ¶ 53; Defendant's Opposing SMF ¶ 53. In determining the materiality of a reduction in compensation, WorldCom "would look at what appeared to be reasonable." Plaintiff's SMF ¶ 54; Defendant's Opposing SMF ¶ 54. WorldCom's criterion for what was "reasonable" consisted of what was "unreasonable in terms of what you expect people to live on." *Id.* What was reasonable was "something that would vary by the people involved." Defendant's Opposing SMF ¶ 54; Plaintiff's Reply SMF ¶ 54.

Kerkhof had been covered under a health insurance plan provided by WorldCom. Plaintiff's SMF ¶ 29; Defendant's Opposing SMF ¶ 29. Her termination of employment constituted a qualifying event pursuant to the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"). *Id.* WorldCom did not provide notice to Kerkhof of her rights under COBRA until, at the earliest, September 16, 1997, seventy-seven days after the termination of her employment. Plaintiff's SMF ¶ 30; Defendant's Opposing SMF ¶ 30. WorldCom provided Kerkhof with the full sixty days to decide whether or not to elect COBRA coverage, which would have continued her group health benefits as of the date her coverage ceased. Defendant's Opposing SMF ¶ 30; Plaintiff's Reply SMF ¶ 30. Kerkhof deliberately decided not to elect COBRA coverage. *Id.*

By letter dated October 21, 1997 to Sue Armstrong, Plan Administrator, MFS Shareworks Grant Plan, WorldCom, Inc., Omaha, Nebraska, Kerkhof requested the following regarding the Shareworks Plan: (i) registration documents, (ii) SPD, (iii) plan document, (iv) plan description, (v) plan information statement, (vi) terminal report, (vii) bargaining agreement, (viii) trust agreement, (ix) contract, (x) other instruments under which the plan was established or operated and any amendments thereto, and (xi) the latest annual report. Plaintiff's SMF ¶ 59; Defendant's Opposing SMF ¶ 59. In response, Kerkhof received a letter from Peg Breen dated October 24, 1997 indicating that the addressee of her letter, who worked out of the Omaha, Nebraska office, was no longer with the company. Defendant's Opposing SMF ¶ 60; Plaintiff's Reply SMF ¶ 60. Breen advised Kerkhof that her request for documents was forwarded to Dona Miller. *Id.*

By letter dated December 31, 1997 Kerkhof made a second request for documents related to the Shareworks Plan. Plaintiff's SMF ¶ 61; Defendant's Opposing SMF ¶ 61. Miller never received this request. Defendant's Opposing SMF ¶ 61; Plaintiff's Reply SMF ¶ 61. Kerkhof also requested documents from another WorldCom employee, Marla Riebock. Defendant's Opposing SMF ¶ 62; Plaintiff's Reply SMF ¶ 62. In response, Riebock sent Kerkhof a letter dated January 16, 1998 enclosing a number of documents that she believed were responsive to Kerkhof's request. *Id.* As it turned out, the documents Riebock sent related to a different Shareworks Plan, and the annual report she sent was the corporate annual report, not the Shareworks Plan annual report. *Id.*

By letter dated July 23, 1998 to WorldCom, Kerkhof, through counsel, set forth a demand for compensation arising from the legal claims at issue in this case. Plaintiff's SMF ¶ 64; Defendant's Opposing SMF ¶ 64. Counsel also informed WorldCom that it

had failed to comply with Kerkhof's request for documents related to the Shareworks Plan. *Id.*

WorldCom did not produce the plan document and SPD for the Shareworks Plan until September 10, 1999, after Kerkhof filed the instant suit and had served a document request on WorldCom. Plaintiff's SMF ¶ 66; Defendant's Opposing SMF ¶ 66. WorldCom's production of these two documents occurred 686 days after it received Kerkhof's initial request. *Id.* The Shareworks Plan trust agreement was produced on December 22, 1999. Defendant's Opposing SMF ¶ 70; Plaintiff's Reply SMF ¶ 70. WorldCom has never produced a copy of the 1996 annual report for the Shareworks Plan. Plaintiff's SMF ¶ 65; Defendant's Opposing SMF ¶ 65. WorldCom denies that Kerkhof ever has requested that report inasmuch as she requested only the "latest annual report," and WorldCom supplied her with both the 1997 and 1998 IRS Form 5500s. Defendant's Opposing SMF ¶ 65.

### **III. Analysis**

#### **A. Count I: Breach of Contract (Stock Option Agreement)**

Kerkhof contends in Count I of the Complaint that WorldCom breached the SOA by refusing to permit her to exercise options on 882 shares of WorldCom stock on the ground that her right to exercise those options had not vested. Complaint ¶¶ 46-49. WorldCom assumes without discussion, and Kerkhof does not contest, that Maine law governs this state-law question. *See* Defendant's Motion at 5; Plaintiff's Opposition at 5-15. I accordingly apply Maine law.

The SOA outlines three circumstances under which, following a change in control, an employee is considered to have been constructively involuntarily terminated

for purposes of acceleration of the vesting schedule: “(x) a material reduction in the Employee’s compensation (including applicable fringe benefits), (y) the demotion or diminution in the Employee’s position, authority, duties or responsibilities without cause or (z) the relocation of the Employee’s principal place of employment, without consent.” Kerkhof concedes that she is not entitled to automatic vesting on the basis of the third circumstance (relocation); she seeks summary judgment on the basis of the second (compensation), asserting that genuine issues of material fact preclude the issuance of summary judgment on the basis of the first (demotion). Plaintiff’s Opposition at 4 n.4; Plaintiff’s Motion at 2 & n.2, 15.

WorldCom cross-moves for summary judgment, claiming as a threshold matter that the cause of action fails because Kerkhof quit her job to follow her husband to Maine, not because she was dissatisfied with either her post-merger job duties or pay the latter of which she never even bothered to mention upon requesting accelerated vesting.<sup>6</sup> Defendant’s Motion at 1-2, 4-8, 12-13. Kerkhof rejoins and I agree that her motivation for leaving her job is irrelevant. *See* Plaintiff’s Opposition at 6-9.

“When contract language is ambiguous, the factfinder may entertain extrinsic evidence casting light upon the intention of the parties with respect to the meaning of the unclear language. Contract language that is unambiguous must be given its plain

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<sup>6</sup>WorldCom interposes a second threshold defense: that even in the context of a breach-of-contract action concerning a non-ERISA agreement, an employment committee’s interpretation must be upheld regardless whether right or wrong so long as neither arbitrary nor capricious. Defendant’s Reply Brief in Support of Its Motion for Summary Judgment or Partial Summary Judgment (“Defendant’s Reply”) (Docket No. 43) at 1-3. The court generally will not address an argument advanced for the first time in a reply memorandum. *See, e.g., In re One Bancorp Sec. Litig.*, 134 F.R.D. 4, 10 n.5 (D. Me. 1991). Even though in proffering this argument WorldCom relies on a case decided on May 16, 2000 that happens to concern an SOA issued pursuant to the 1993 Stock Plan, I see no reason to make an exception. The case, *Mauldin v. WorldCom, Inc.*, No. 98-CV-307-K, slip op. (N.D. Ok.) (May 16, 2000), attached as Exh. A to Defendant’s Reply, is neither controlling authority nor does it purport to craft a ground-breaking principle of law.

meaning. Whether contract language is ambiguous is a question of law.” *Bangor Publ’g Co. v. Union St. Mkt.*, 706 A.2d 595, 597 (Me. 1998) (citations omitted).

The SOA language at issue is unambiguous, overriding the conflicting MFS management Q&A. The SOA does not require (as MFS easily could have provided) that an employee have resigned as a result of dissatisfaction with pay, location or job duties; it states instead that a constructive involuntary termination “shall include” the happening of any of the three enumerated events. Cases cited by WorldCom do not compel a different result. See Defendant’s Motion at 6; *Kreis v. Charles O. Townley, M.D. & Assocs., P.C.*, 833 F.2d 74, 82 (6th Cir. 1987) (applying common-law principles of constructive discharge); *Worth v. Huntington Bancshares, Inc.*, 540 N.E.2d 249, 253, 255-56 (Ohio 1989) (construing contract language that explicitly required employee to have resigned on account of diminished status or responsibility). The conflicting Q&A pamphlet yields in the face of the clear contract language.

WorldCom next asserts that Kerkhof’s alleged demotion cannot form the basis for a claim of constructive involuntary termination because she resigned too soon before she began performing any of her new duties and before she even knew what they would entail. Defendant’s Motion at 8-9. The case on which WorldCom primarily relies, *Collins v. Ralston Purina Co.*, 147 F.3d 592 (7th Cir. 1998), is distinguishable.

In *Ralston Purina*, Collins had signed a retention agreement pursuant to which he was entitled to certain benefits if terminated by his employer’s prospective acquirer. *Id.* at 594. Termination of employment was defined to include “any substantial reduction of duties or responsibilities.” *Id.* Following the acquisition, Collins was offered a position that he perceived as entailing a substantial reduction in his responsibilities. *Id.* He

declined the offer and resigned. *Id.* at 600. The court held that the agreement required an actual (rather than anticipated) reduction in responsibilities, noting that the record did not support Collins's contention that the reassignment would have been a *fait accompli* or that the position had been offered on a "take it or leave it basis." *Id.*

In this case, there is evidence that Kerkhof was in fact reassigned to Judy Cody's group, that she did seek alternative work but that her request was denied, and that she knew what the job would have entailed. Thus, the fact that she resigned before actually commencing the new job duties or even receiving a written job description is not dispositive.

Dropping down to the next level of analysis, WorldCom argues that Kerkhof suffered neither a demotion or diminution in responsibilities nor a material reduction in compensation. Defendant's Motion at 10-12, 14. With respect to demotion, the parties offer clashing evidence on the core issue whether there was in fact a demotion or diminution clearly necessitating resolution of the question by a trier of fact.

The compensation issue, as well, eludes summary judgment although for different reasons. Even assuming *arguendo* that Kerkhof suffered losses that in themselves constituted a material decrease in compensation (most notably, the replacement of the MFS Bonus Plan with the \$400 holiday bonus), the parties sharply dispute whether the Special Stock Grant compensated for those cutbacks. At the same time, neither side musters sufficient evidence to compel a finding of summary judgment in its/her favor. The SOA sheds no light on the definition of a "material reduction"; the scant extrinsic evidence regarding the term is unilluminating; and neither Kerkhof nor WorldCom favors the court with any evidence as to the value of the Special Stock Grant at the time of

Kerkhof's termination.<sup>7</sup> Accordingly, no meaningful comparison of Kerkhof's total compensation package before and after the merger is possible.

WorldCom is entitled to summary judgment as to Count I solely on the issue conceded by Kerkhof that she is not entitled to a finding of constructive involuntary termination on the basis of relocation. The cross-motions for summary judgment as to Count I otherwise merit denial.

#### **B. Counts III-IV: ERISA Violations (Shareworks Plan)**

Kerkhof complains in Counts III and IV that WorldCom wrongly refused to recognize the vesting of her right to exercise options on 268.230 shares of stock in the Shareworks Plan in contravention of the Employee Retirement Income Security Act of 1974 ("ERISA").<sup>8</sup> Complaint ¶¶ 53-63. She seeks summary judgment as to both counts primarily on the basis that although she resigned effective June 6, 1997, she remained eligible for accelerated vesting upon termination of the plan on June 30, 1997. Plaintiff's Motion at 5-9. I agree.

The Shareworks Plan vests discretionary authority in its administrator to construe the terms of the plan and determine all questions arising in connection with its administration, interpretation and application. When such a "clear discretionary grant is found, *Firestone [Tire & Rubber Co. v. Bruch]*, 489 U.S. 101 (1989)] and its progeny mandate a deferential arbitrary and capricious standard of judicial review." *Terry v.*

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<sup>7</sup>Neither the value of the Special Stock Grant shares as of November 1999 nor the fact that Cody's group was terminated in March of that year is relevant. Nor is it material that, as WorldCom argues, Defendant's Motion at 13-14, Kerkhof had not yet suffered any material decrease in compensation at the time of her departure or that she could not have then known whether the value of the new benefits would outweigh the loss of the old. The SOA contemplates an objective test of the materiality of a reduction in pay.

<sup>8</sup>The parties do not dispute that the Shareworks Plan was subject to ERISA. Plaintiff's SMF ¶ 8; Defendant's Opposing SMF ¶ 8.

*Bayer Corp.*, 145 F.3d 28, 37 (1st Cir. 1998) (citation and internal quotation marks omitted). Still, the discretion of the Shareworks Plan administrator is not boundless; the plan must by its own terms be administered “consistent with the intent that the Plan shall continue to be deemed a qualified plan under the terms of Section 401(a) of the [Internal Revenue] Code . . . .” Shareworks Plan at § 2.4. See *Borda v. Hardy, Lewis, Pollard & Page, P.C.*, 138 F.3d 1062, 1067 (6th Cir. 1998) (“we take this [similar plan language] to mean that if it were clear as a matter of law that a particular interpretation . . . would result in disqualification of the plan, the trustees would have no discretion to adopt that interpretation.”); *Bouchard v. Crystal Coin Shop, Inc.*, 843 F.2d 10, 16 (1st Cir. 1988) (“a trustee’s plan interpretation that is contrary to IRS regulations, rulings, or interpretations is evidence of arbitrariness or lack of good faith”) (citation and internal quotation marks omitted).

Section 8.2(a) of the Shareworks Plan provides that upon the plan’s termination, “all amounts credited to the affected Participants’ Accounts shall become 100% Vested and shall not thereafter be subject to forfeiture . . . .” The parties contest two points: whether Kerkhof was a “Participant” and, if so, whether as of the time of the plan’s termination any amounts were in fact credited to her account. Plaintiff’s Motion at 5-9; Defendant’s Opposition at 3-10.

As to the first point, Kerkhof and WorldCom offer reasonable though opposing interpretations. WorldCom emphasizes that the term “Participant” is defined to mean “any Employee”; an “Employee” in turn is “any person who is employed by the Company”; and Kerkhof fit a special category of person defined as a “Terminated Participant,” *i.e.*, “a person who has been a Participant, but whose employment has been

terminated.” Defendant’s Opposition at 5. WorldCom reasons that, inasmuch as Kerkhof was not an employee as of June 30, 1997, she could not have been a “Participant.”

Kerkhof underscores that the term “Participant” is defined to mean an Employee “who becomes a participant in the Plan . . . and has not for any reason become ineligible to participate further in the Plan.” Plaintiff’s Motion at 5-6. In her view, she fit this description as of June 30, 1997; she was eligible for rehire and had not incurred a five-year break in service. *Id.* at 6.

Were this the end of the analysis, WorldCom would prevail. *See Bouchard*, 843 F.2d at 13 (in construing ERISA plan subject to deferential standard of review, “we are not free to impose our own view of which interpretation is better or fairer; rather, our inquiry is limited by the rule that where both the trustees of a pension plan and a rejected applicant offer rational, though conflicting, interpretations of plan provisions, the trustees’ interpretation must be allowed to control.”) (citations and internal quotation marks omitted).

The catch in this case is that the WorldCom interpretation jeopardizes the Shareworks Plan’s status as a qualified plan something its administrator had no power to do. The Internal Revenue Code provides in relevant part:

(3) **Termination or partial termination; discontinuance of contributions.** [A] trust shall not constitute a qualified trust under section 401(a) unless the plan of which such trust is a part provides that

(A) upon its termination . . .

the rights of all affected employees to benefits accrued to the date of such termination . . ., to the extent funded as of such date, or the amounts credited to the employees’ accounts, are nonforfeitable.

26 U.S.C. § 411(d)(3). The categorical exclusion of all former employees from eligibility for accelerated vesting upon plan termination does not comport with this statutory requirement. *See, e.g.*, Gen. Couns. Mem. 39,310 (April 1, 1984) (holding, in construing section 411(d)(3), “that an employee who separates from service but will not suffer a forfeiture until he incurs a break-in-service will become vested in his accrued benefit, to the extent funded, if the plan terminates prior to his incurring a break-in-service.”); *see also Borda*, 138 F.3d at 1067 (“Implicit in this conclusion [of Gen. Couns. Mem. 39,310], we believe, is an understanding that the employee who had separated from service was one who still stood to be ‘affected’ by the termination of the plan.”); *Flanagan v. Inland Empire Elec. Workers Pension Plan & Trust*, 3 F.3d 1246, 1249 (9th Cir. 1993) (“Although [section 411(d)(3)] does not specify whether a former employee can benefit from its vesting rule, we conclude that a former employee is fairly included within its scope.”).

Section 411(d)(3) does not encompass all employees (whether former or current); it pertains only to “affected” employees. This implicates the second plan-construction question: whether, as of June 30, 1997, any amounts were credited to Kerkhof’s account. WorldCom contends that all such amounts were immediately forfeited upon Kerkhof’s termination; Kerkhof asserts that they could have been forfeited only as of the end of the plan year on December 31, 1997. Defendant’s Opposition at 5-10; Plaintiff’s Motion at 6-9. Kerkhof again has the better of the argument.

As both sides recognize, *see id.*, the First Circuit confronted a similar forfeiture-timing question in *Bouchard*. Bouchard, like Kerkhof, was a participant in an ERISA plan that provided for accelerated vesting of forfeitable benefits upon termination of the

plan. *Bouchard*, 843 F.2d at 12. On June 6, 1984 Bouchard resigned his position; effective July 20, 1984 his employer, Crystal Coin Shop, Inc. (“Crystal”) terminated the plan. *Id.* Section 10.07 of the Crystal plan provided:

Forfeitures. After a Participant has terminated employment, the value of any forfeitable Accrued Benefit of such Participant shall be used to reduce the Employer’s future contribution under the Trust upon the earlier of [1] distribution of the Participant’s nonforfeitable Accrued Benefit or [2] occurrence of a [one year] Break-in-Service.

*Id.* at 15. Bouchard argued *inter alia* that this section controlled the timing of the forfeiture of his benefit; Crystal contended that it simply governed how and when benefits might be used once forfeited. *Id.* The First Circuit determined that, in view of the fact that the plan did not clearly state when forfeitures occurred, Crystal’s interpretation was neither arbitrary nor capricious. *Id.* at 16.

The Shareworks Plan is distinguishable in a critical sense: It clearly states not only when the trustees may use forfeited benefits but also when such forfeitures occur. Section 7.1 of the plan provides that “[i]f, upon a Participant’s Termination of Employment, such person is not Vested in his Account under the Plan, he shall not be entitled to receive any distribution from his Account under the Plan, and the value of such Account shall be forfeited in accordance with the provisions of Section 4.4.” Section 4.4 states: “If a Participant terminates his employment before his Account is vested, the Participant’s Account shall be forfeited as of the last day of the Plan Year during which his termination of employment occurred, and shall be used to reduce any Employer

contributions made pursuant to Section 4.1.” The last day of the Plan Year is December 31st.<sup>9</sup> Shareworks Plan at § 1.1(dd).

WorldCom struggles to ascribe a different meaning to this language, contending that (i) section 7.1 clearly mandates forfeiture upon “a Participant’s Termination of Employment,” (ii) section 4.4 appears in Article IV, which addresses contribution and allocation, not employee-forfeiture issues, and (iii) section 7.1 contemplates forfeiture of the value of the shares (an allocation issue) rather than the shares themselves (an employee issue). Defendant’s Opposition at 4-6 & nn. 6-7. This is more freight than the language can bear. The only portion of section 7.1 that explicitly addresses the timing of forfeiture is its cross-reference to section 4.4. That section in turn makes crystal clear that the “Participant’s Account” itself not just the value of the account is forfeited at the end of the plan year.

The Plan trustees’ interpretation of the Plan as providing for forfeiture immediately upon termination is arbitrary and capricious inasmuch as it contravenes the plain language of the Plan. *See, e.g., Bouchard*, 843 F.2d at 13-14 (“Where the trustees of a plan impose a standard not required by the plan’s provisions, or interpret the plan in a manner inconsistent with its plain words . . . their actions may well be found to be

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<sup>9</sup>That the Shareworks Plan SPD advised employees that the value of their shares would be subject to immediate forfeiture upon termination does not change the outcome. In the event of a conflict between plan and SPD language and in the absence of an employee’s reliance to his or her detriment on an SPD the language of the plan controls. *See, e.g., Andersen v. Chrysler Corp.*, 99 F.3d 846, 858 (7th Cir. 1996) (when plan itself gives employee greater protection, it, rather than SPD, controls). Nor does it matter that, as WorldCom points out, *see* Defendant’s Opposition at 8, the First Circuit in *Bouchard* referred to ERISA plans such as that in issue here as the “immediate-forfeiture-with-restoration type.” As Kerkhof contends, this was merely a shorthand reference by which the First Circuit distinguished such plans from so-called “delayed forfeiture plans,” in which benefits are not forfeited until the end of the restoration period (and hence, no provision for restoration is required). *See* Plaintiff’s Reply at 2-3. Regulations cited by the First Circuit do not specify that forfeiture must take place immediately upon an employee’s termination. *See Bouchard*, 843 F.2d at 14; 26 C.F.R. §§ 1.411(a)-7(d)(2)(ii) & (d)(4)(i).

arbitrary and capricious.”). Inasmuch as Kerkhof was both a “Participant” and a person with a non-forfeited account balance as of June 30, 1997, she was entitled pursuant to section 8.2 of the Shareworks Plan to accelerated vesting upon that plan’s termination. Summary judgment accordingly should be granted as to Kerkhof and denied as to WorldCom with respect to Counts III and IV of the Complaint.

### **C. Counts V and X: Failure To Supply Information**

Kerkhof in Counts V and X asserts violations of rights to obtain timely benefits information pursuant to ERISA and COBRA, claiming that WorldCom failed to provide her with Shareworks Plan documents within thirty days of request and failed to notify her of her right to continued health insurance coverage within fourteen days of her termination of employment. Complaint ¶¶ 64-69, 91-94.

ERISA provides that plan administrators must, upon the written request of a participant or beneficiary and with exceptions not here relevant, furnish copies of the requested plan documents within thirty days. 29 U.S.C. §§ 1024(b)(4), 1132(c)(1). COBRA requires that plan administrators must, within fourteen days of receipt of notice of employment termination, provide a departing employee with notice of his/her right to elect to continue coverage under an employer’s health-insurance plan. 29 U.S.C. §§ 1161(a), 1163(2), 1166(a)(4)(A) & (c). In the case of a violation of either requirement, a plan administrator “may in the court’s discretion be personally liable to such participant or beneficiary in the amount of up to \$100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. . . .” 29 U.S.C. § 1132(c)(1).

There is no question in this case that WorldCom was late both in responding to Kerkhof's Shareworks Plan document requests and in sending her a COBRA notice.<sup>10</sup> However, 29 U.S.C. § 1132(c)(1), upon which both Counts V and X hinge, vests the district court with discretion whether to hold a plan administrator liable for statutory penalties (or any other form of relief) when its notice and disclosure requirements are transgressed.

Kerkhof first contends that the court need find neither bad faith on WorldCom's part nor harm to her to justify the imposition of statutory penalties. *See* Plaintiff's Opposition at 17-18. However, this court has previously declined to impose penalties pursuant to 29 U.S.C. § 1132(c)(1) in the absence of a showing of either harm to the plaintiff or bad faith on the part of the plan administrator. *See, e.g., Dall v. Chinnet Co.*, 33 F.Supp.2d 26, 37-38 (D. Me. 1998) (declining in summary-judgment context to award penalties with respect to ERISA-disclosure violations); *Boucher v. Williams*, 13 F.Supp.2d 84, 105 (D. Me. 1998) (granting summary judgment to plan administrator despite COBRA-notice violations). The First Circuit has discerned no abuse of discretion in such a determination. *Rodriguez-Abreu v. Chase Manhattan Bank*, 986 F.2d 580, 588 (1st Cir. 1993) ("Although prejudice and bad faith are not prerequisites for imposition of penalties, these are factors which the district court properly considered in exercising its discretion not to impose penalties."). I see no reason to veer from this path.

Kerkhof next weakly argues that, in any event, she demonstrates both bad faith and prejudice in this case. Plaintiff's Opposition at 17-18. Kerkhof asserts that she has

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<sup>10</sup>The parties dispute the degree of lateness, *see, e.g.*, Defendant's Opposition at 19 n.32; however, that issue need not be reached.

suffered harm in the form of sheer frustration and the incurrence of legal fees to pursue her disclosure rights. *Id.* at 17. As WorldCom correctly points out, Defendant's Reply at 5 n.8, this 11th-hour argument finds no support in the record. It is thus the equivalent of a tree falling in a forest for purposes of summary judgment. *See* Loc. R. 56(e) ("The court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment.").

Kerkhof's assertion of bad faith seems to boil down to an accusation that WordCom was recalcitrant and its delay inexplicable. *See, e.g.*, Plaintiff's Motion at 18; Plaintiff's Opposition at 18 n.21. With respect to the ERISA request, the undisputed facts reveal nothing more than an unfortunate confusion and bumbling on the part of WorldCom, which mislaid Kerkhof's initial letter and then inadvertently responded with the wrong documents.<sup>11</sup> The COBRA tardiness is indeed unexplained and puzzling, but given that the notice did afford Kerkhof the full sixty days in which to elect coverage, I can discern no bad faith from the simple fact of the tardiness alone.

I accordingly conclude that WorldCom is entitled to summary judgment with respect to Counts V and X.

#### **IV. Conclusion**

For the foregoing reasons, I recommend that the Plaintiff's Motion be granted with respect to Counts III and IV of the Complaint and otherwise denied; and that the Defendant's Motion be granted with respect to Counts II and V-XIII of the Complaint as

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<sup>11</sup>Inasmuch as Kerkhof did not make WorldCom aware until July 23, 1998 that she had received the wrong documents, and did so only through a demand letter from counsel seeking damages for the default but not specifically reiterating a request for the documents, I discern no bad faith in WorldCom's failure from that point to disclose the correct documents until required to do so as part of the discovery process in the instant case.

well as that portion of Count I alleging constructive involuntary termination based on relocation, and otherwise denied. Thus, should this recommended decision be adopted, the only issue remaining for trial will be whether, pursuant to Count I, WorldCom breached the SOA on any ground save that of constructive involuntary termination based on relocation.

**NOTICE**

***A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

***Dated this 26th day of June, 2000.***

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**David M. Cohen**

STNDRD

TRLIST

U.S. District Court  
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 99-CV-118

KERKHOF v. MCI WORLDCOM INC  
04/13/99

Filed:

Assigned to: JUDGE D. BROCK HORNBY

Jury demand: Plaintiff

Demand: \$0,000

Nature of Suit: 791

Lead Docket: None

Jurisdiction: Federal

Question

Dkt# in other court: None

Cause: 29:1132 E.R.I.S.A.-Employee Benefits

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